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No. 76-1327

In the Supreme Court of the United States

OCTOBER TERM, 1976

CHARLES GOODROE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The court of appeals affirmed without opinion (Pet. App. A).

JURISDICTION

The judgment of the court of appeals was entered on February 28, 1977. The petition for a writ of certiorari was filed on March 25, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 922(h), prohibiting a convicted felon (among others) from receiving any firearm that "has been shipped or transported in interstate or foreign commerce," extends to the receipt of a firearm in an intrastate transaction that occurred after the first retail sale of the firearm following its interstate shipment.

2. Whether, if it does, the statute is constitutional.

3. Whether petitioner's sentence to five years' imprisonment for violating Section 922(h) was improper because his conduct also violated 18 U.S.C. App. 1202(a), which provides for a maximum of only two years' imprisonment.

4. Whether petitioner was denied due process by the return of a superseding indictment.

STATUTES INVOLVED

18 U.S.C. 922(h) provides in pertinent part:

> It shall be unlawful for any person—(1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year * * * to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. App. 1202(a) provides in pertinent part:

> Any person who—
>
> (1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, * * * and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted, as a previously convicted felon, of receiving a firearm that had been shipped in interstate commerce, in violation of 18 U.S.C. 922(h). He was sentenced to five years' imprisonment. The court of appeals affirmed (Pet. App. A).

On April 9, 1973, petitioner was convicted in a Pennsylvania state court of burglary, a felony (Tr. 92).[1] On November 24, 1975, during a search of petitioner's residence in Philadelphia, Pennsylvania, pursuant to a warrant, law enforcement officers discovered a .32 caliber revolver (Tr. 36, 48-52). Petitioner was present at the time of the search; he admitted that the weapon was his and that he had purchased it from an individual in Philadelphia approximately two years before (Tr. 52-53, 68). The revolver had been manufactured in Massachusetts, shipped to a Pennsylvania dealer in 1973, and sold to a customer in Pennsylvania in February 1974 (Tr. 80, 97, 101).

ARGUMENT

1. 18 U.S.C. 922(h) makes it unlawful for a convicted felon "to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." Petitioner contends that Section 922(h) does not apply to him because his intrastate acquisition of the revolver took place after the first retail sale following its interstate shipment.

This claim is foreclosed by *Barrett* v. *United States*, 423 U.S. 212, in which the Court held that Section 922(h) applies, in accordance with its unambiguous language, to all acquisition of firearms by convicted felons, in intrastate as well as interstate transactions, provided there has been an interstate movement of the firearm at some time in the past. Although the specific transaction in *Barrett* was the first retail sale after an interstate shipment of the firearm, petitioner's effort to limit that case to its narrow facts is unpersuasive. The Court approved the jury instruction that

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[1] "Tr." refers to the trial transcript. "S.H. Tr." refers to the transcript of the pretrial suppression hearing.

the interstate commerce requirement of Section 922(h) is satisfied if the firearm at some time in its past has traveled in interstate commerce (423 U.S. at 215); ruled that "the persons Congress classified as potentially irresponsible and dangerous * * * are comprehensively barred by the Act from acquiring firearms by any means" (423 U.S. at 218); and held that the language of Section 922(h), which "is directed unrestrictedly at the felon's receipt of any firearm that 'has been' shipped in interstate commerce" and "contains no limitation to a receipt which itself is part of the interstate movement * * * 'means exactly what it says' " (423 U.S. at 216).[2] See also *Scarborough* v. *United States*, No. 75-1344, decided June 6, 1977, slip op. 6-7.

2. Petitioner also contends that, if Section 922(h) applies to his case, then the statute is beyond Congress' power to enact under the Commerce Clause (Pet. 13-14).

Congress has broad power under the Commerce Clause to regulate the transfer of goods after they have been shipped in interstate commerce. See *United States* v. *Sullivan*, 332 U.S. 689, 698 (Congress may "regulate the branding of articles that have completed an interstate shipment and are being held for future sales in purely local or intrastate commerce"). Moreover, Congress may impose criminal sanctions for the purpose of regulating even purely intrastate activities, where the cumulative impact of that class of activities substantially affects interstate commerce. *Perez* v. *United States*, 402 U.S. 146; *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241. Where the class of activities is regulated and that class is within the reach of

[2]Petitioner's reliance on *United States* v. *Ruffin*, 490 F. 2d 557 (C.A. 8), is unavailing. *Ruffin* was decided prior to this Court's decision in *Barrett* and was based on the proposition, expressly rejected in *Barrett*, that Section 922(h) applies only when "at the time the [firearm] was received it was part of an interstate transportation" (490 F. 2d at 560).

federal power, courts may not " 'excise, as trivial, individual instances' " of the class. *Perez* v. *United States*, *supra*, 402 U.S. at 154.

Congress has properly found that the possession and receipt of firearms by felons constitutes "a burden on commerce or threat affecting the free flow of commerce."[3] 18 U.S.C. App. 1201. Thus, the regulation of the receipt by felons of firearms that have moved in interstate commerce, whether the receipt occurs in interstate or wholly intrastate transactions, falls clearly within the permissible bounds of the commerce power. See *Scarborough* v. *United States*, *supra*, slip op. 9; *United States* v. *Rosenbarger* 536 F. 2d 715, 718 (C.A. 6); *United States* v. *Day*, 476 F. 2d 562 (C.A. 6); *Mandina* v. *United States*, 472 F. 2d 1110 (C.A. 8), certiorari denied, 412 U.S. 907; *United States* v. *Nelson*, 458 F. 2d 556 (C.A. 5); cf. *Huddleston* v. *United States*, 415 U.S. 814, 833.

3. Petitioner's conviction and sentencing under Section 922(h) was not improper simply because his conduct also violated 18 U.S.C. App. 1202(a), which authorizes a lesser maximum term of imprisonment than Section 922(h). See 18 U.S.C. 924(a). Although the prohibitions of the two sections are directed to some of the same persons, each statute also reaches persons not covered by the other. See *United States* v. *Bass*, 404 U.S. 336, 342

[3]The rational basis for this finding is apparent. See *Heart of Atlanta Motel*, *supra*, 379 U.S. at 258. As the Sixth Circuit observed in *Stevens* v. *United States*, 440 F. 2d 144, 151-152, the unquestionably high rate of recidivism among convicted felons and the widespread use of firearms in the commission of crimes affecting commerce leaves "no serious doubt that the possession of firearms by convicted felons is a threat to interstate commerce." See also *Mandina* v. *United States*, 472 F. 2d 1110, 1113-1114 (C.A. 8), certiorari denied, 412 U.S. 907; *United States* v. *Nelson*, 458 F. 2d 556, 559 (C.A. 5).

n. 9. Moreover, although a felon who receives a firearm that has been shipped in interstate commerce violates both sections (see 404 U.S. at 350), Section 1202(a) is much broader in coverage, encompassing the receipt, possession, or transportation of all firearms "in commerce or affecting commerce." It was not unreasonable for Congress to authorize a lesser penalty for this more broadly defined crime, and petitioner is not immune from prosecution under Section 922(h) simply because his act also happened to violate the proscriptions of a second statute. *United States* v. *Phillips*, 522 F. 2d 388, 393 (C.A. 8); see *United States* v. *Green*, 494 F. 2d 820, 826-828 (C.A. 5), certiorari denied, 419 U.S. 1004; cf. *United States* v. *Beacon Brass Co.*, 344 U.S. 43.

Finally, since both sections were initially enacted as part of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 197, 228, 236,[4] petitioner cannot argue that Section 1202(a) repealed by implication the more severe penalty provisions of Section 922(h). Cf. *Edwards* v. *United States*, 312 U.S. 473, 483-484. Rather, given the differences in coverage between the two statutes, they "can exist and be useful, side by side." *Edwards* v. *United States*, *supra*, 312 U.S. at 484.

4. Petitioner argues (Pet. 15-17) that he was denied due process because, following his initial indictment under Section 1202(a) and his rejection of a suggested plea bargain, a superseding indictment was returned charging him with violating Section 922(h) and exposing him to the greater punishment authorized by that section. The superseding indictment, however, was returned on

[4]Both 18 U.S.C. 922 and 18 U.S.C. App. 1202 were amended without relevant change by different titles of the Gun Control Act of 1968, 82 Stat. 1213, 1216, 1236.

February 24, 1976, shortly after this Court's decision of January 13, 1976, in *Barrett* v. *United States*, *supra*. Contrary to petitioner's suggestion, the superseding indictment was not sought by the prosecutor to punish petitioner for declining to accept a plea bargain. Rather, as the district court correctly found (see S.H. Tr. 57-58, 97-99), the government was motivated to seek the superseding indictment by the *Barrett* decision, which had made it clear that Section 922(h) was applicable to petitioner's conduct. This factual determination that prosecutorial vindictiveness played no role in this case does not warrant further review.[5]

[5]There is no reason to hold this petition pending the outcome in *Bordenkircher* v. *Hayes*, No. 76-1334, certiorari granted June 6, 1977. The issue in that case is whether a prosecutor may, in order to induce a defendant to accept a plea bargain, threaten to bring an additional indictment for a more serious crime, and then actually bring such an indictment when the defendant persists in asserting his right to go to trial. In *Hayes* the prosecutor explicitly warned the defendant that he would be indicted for a more serious crime if he did not accept the offered plea bargain (see 547 F. 2d 42, 43), and acknowledged that no event "occurred between the issuance of the first indictment and the issuance of the second to influence his decision except petitioner's insistence upon his right to trial" (*id.* at 44). In the present case, by contrast, no such threat was ever conveyed to petitioner, an intervening event of controlling significance (this Court's decision in *Barrett*) took place, and the district court found that the return of the second indictment was not prompted by the prosecutor's displeasure (if any there was) over petitioner's refusal to accept a plea bargain.. Thus, even if the court of appeals' grant of habeas corpus in *Hayes* is affirmed, there is no reasonable prospect that the outcome of the present case would be affected in any respect.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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